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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/579,352	04/09/2007	David John Judge	F3340(C)	2140
201 7590 10/05/2010 UNILEVER PATENT GROUP 800 SYLVAN AVENUE AG West S. Wing ENGLEWOOD CLIFFS, NJ 07632-3100				
EXAMINER WILLIAMS, LEZA				
ART UNIT		PAPER NUMBER		
1787				
NOTIFICATION DATE		DELIVERY MODE		
10/05/2010		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary

Application No.

10/579,352

Applicant(s)

JUDGE ET AL.

Examiner

LELA S. WILLIAMS

Art Unit

1787

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 July 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 15, 17-21 and 24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 15, 17-21 and 24 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/GS/US)
Paper No(s)/Mail Date _____

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

1. Applicant's amendment filed on July 20, 2010 has been fully considered. The amendment is not persuasive; therefore, the following action is made final.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. **Claims 15, 17-21, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Malone et al. US Pub. No. 2003/0134024 in view of Daniel et al. GB 2357954.**

Regarding claims 15, 17-21, and 24, Malone discloses a frozen aerated confection comprising freezing point depressants in amounts of 25%-37% w/w [0019], with a mean number average molecular weight of less than 300 and 230 [0021 & 0024] and an effective amount of proteins to keep the confection from forming undesirable characteristics [0027]. Malone also discloses "[t]he freezing point depressants are constituted at a level of at least 98% of mono, di, and oligosaccharides" and the use of fructose [0025] and corn syrup with a DE of 63 [0039] and the frozen aerated "confection has an overrun of less than 150%" [0028]. Malone is silent to an amount of polysaccharide being present in the frozen aerated confection. Daniel discloses a frozen aerated confection containing polysaccharides such as guar gum (page 8, lines 4-10), the guar gum present in amounts of 0.4-0.9% (page 8, lines 29-34). Daniel also discloses 1-5% of proteins selected from milk protein, soya protein, whey protein and mixtures thereof (page 8, lines 29-34). Given Daniels explicit disclosure of the use of effective amounts of polysaccharides and proteins used in making a frozen aerated confection, it would have been obvious to one of

ordinary skill in the art to add an effective amount of polysaccharides and proteins, selected from milk protein, soya protein, whey protein and mixtures thereof, to obtain a frozen aerated confection with suitable extensibility and overrun (Daniel, abstract).

Response to Amendment

4. Claims 15, 17-21, and 24 are currently pending.
5. Applicant's amendment is sufficient to overcome the 35 U.S.C. 112, second paragraph rejections set forth in the previous office action. The rejections are withdrawn.
6. Applicant's cancellation of claims 1-7 and 10-14 is sufficient to overcome the 35 U.S.C. 102(b) rejection set forth in the previous office action. The rejection is withdrawn. However, regarding applicant's claim of foreign priority, applicant is reminded that "Applicant's own work which was available to the public before the grace period may be used in a 35 U.S.C. 102(b) Rejection. "Any invention described in a **printed publication more than one year prior to the date of a patent application** is prior art under Section 102(b), even if the printed publication was authored by the patent applicant." De Graffenried v. United States, 16 USPQ2d 1321, 1330 n.7 (Cl. Ct. 1990). **A rejection under 35 U.S.C. 102(b) cannot be overcome by affidavits and declarations under 37 CFR 1.131 (Rule 131 Declarations), foreign priority dates, or evidence that applicant himself invented the subject matter.** Outside the 1-year grace period, applicant is barred from obtaining a patent containing any anticipated or obvious claims. In re Foster, 343 F.2d 980, 984, 145 USPQ 166, 170 (CCPA 1965)". (MPEP 2133.02). A 35 U.S.C. 102(b) rejection is based off of the printed publication date, not the filing date.
7. Regarding applicant's statement of:

Malone et al. is not a reference against the claims. The invention of Malone et al. has some common inventorship with the present application and was published less than one year before the priority date of the present application. (pg. 6)

Malone is applied as 35 U.S.C. 102(b) art, as stated above, and can be used as prior art. Regarding applicant's statement concerning Daniel et al. (GB 2 357 954), it is noted that Daniel does not teach desired overrun, which is why the reference is not used to do so. Daniel is applied to the present claims as a teaching of the use of polysaccharides, in particular, guar gum in the amount of 0.4-0.9%. Daniel does not have to disclose all the features of the present claimed invention, as it is used as teaching reference, and therefore, it is not necessary for this secondary reference to contain all the features of the presently claimed invention, *In re Nievelt*, 482 F.2d 965, 179 USPQ 224, 226 (CCPA 1973), *In re Keller* 624 F.2d 413, 208 USPQ 871, 881 (CCPA 1981). Rather this reference teaches a certain concept, namely the use of said polysaccharides amounts to obtain a suitable frozen aerated confection, and in combination with the primary reference, discloses the presently claimed invention.

Conclusion

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to LELA S. WILLIAMS whose telephone number is (571)270-1126. The examiner can normally be reached on Monday to Thursday from 7:30am-5pm (EST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on 571-272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/LELA S. WILLIAMS/
Examiner, Art Unit 1787

/L. S. W. /

/Callie E. Shosho/
Supervisory Patent Examiner, Art Unit 1787